No. 20553

In the

United States Court of Appeals

For the Ninth Circuit

ANGUS J. DEPINTO and MARGARET F. DEPINTO,
Appellants,

and

JAMES P. DONOHUE, as Trustee in Bankruptcy of the Estate of Angus J. DePinto,
Intervenor-Appellant,

vs.

PROVIDENT SECURITY LIFE INSURANCE COMPANY, and ALBERT J. DOIG,
Appellees.

Reply Brief of Appellants, Angus J. and Margaret F. DePinto, and Intervenor-Appellant, James P. Donohue

---

HERBERT MALLAMO
EVANS, KITCHEL & JENCKES
363 North First Avenue
Phoenix, Arizona 85003

Attorneys for Appellant, Angus J. DePinto

JONES & BRINIG
Security Building
Phoenix, Arizona

Attorneys for James P. Donohue, Trustee in Bankruptcy of the Estate of Angus J. DePinto

SORG PRINTING COMPANY OF CALIFORNIA, 346 FIRST STREET, SAN FRANCISCO 94105

INDEX

TABLE OF AUTHORITIES

Cases

Statutes and Rules

Texts

No. 20553

In the

United States Court of Appeals

For the Ninth Circuit

ANGUS J. DEPINTO and MARGARET F. DEPINTO,
Appellants,

and

JAMES P. DONOHUE, as Trustee in Bankruptcy of the Estate of Angus J. DePinto,
Intervenor-Appellant,

vs.

PROVIDENT SECURITY LIFE INSURANCE COMPANY, and ALBERT J. DOIG,
Appellees.

Reply Brief of Appellants, Angus J. and Margaret F. DePinto, and Intervenor-Appellant, James P. Donohue

---

Preface

Appellees' gratuitous statements that, "the DePinto marital community is hopelessly insolvent", and that the Trustee in Bankruptcy is the "real party in interest here", are erroneous. Counsel for appellees have the unfortunate proclivity of going outside the record. In so doing, they overlook the fact that, if the judgment herein is set aside, the only substantial liabilities which the DePinto Estate will face are promissory notes and guaranties,

co-signed by one or more individuals, and the bulk of which are secured by mortgages upon the property of third parties. It is anticipated that the ultimate liabilities of the DePinto estate will be substantially less than the total value of the assets. Under the circumstances, the reversal of this action is of vital interest to DePinto.

Argument

1.

VERDICT NOT SUPPORTED BY THE EVIDENCE

(a) Liability.

We are not unfamiliar with the rule that the verdict of a jury will not be set aside if there is substantial evidence to support it. In the case at Bar, we presume that this Court will apply that rule, but will also adopt the attitude of the Supreme Court of the United States expressed in *Mortenson v. United States,* 322 U.S. 369, 64 S.Ct. 1037, 88 L.Ed. 1331:

> "But we have never hesitated to examine a record to determine whether there was any competent and substantial evidence fairly tending to support the verdict."

Such attitude was expressed by the Supreme Court of the State of Arizona in *Hansen v. Oakley,* 76 Ariz. 307, 263 P.2d 807, 808:

> "On the other hand, if the evidence is not in conflict the only issue is whether the trial court properly applied the law to the facts. The rule is well settled that we are not bound by the conclusions of the trial court or jury, but are at liberty to draw our own legal conclusions from the admitted facts. See Sanders v. Brown, 73 Ariz. 116, 238 P.2d 941, and cases therein cited."

Our position is quite clear. After the members of the Niesz group were elected to the Board of Directors of United, they caused assets of United to be exchanged for American stock.

DePinto did not participate in this transaction, directly or indirectly. Irrespective of DePinto's failure to investigate the antecedents of the members of the Niesz group, he cannot be held responsible for their acts, for the reason that they were reputable business and professional men; there was no reason for him to believe that they were irresponsible or untrustworthy men who would not be restrained by any scruples from "looting" United. DePinto's concurrence in the election of the Niesz group to the Board of Directors of United cannot be considered negligence and, as a matter of law, it cannot be considered as a proximate cause of the transaction complained of; the intervening conduct of the Niesz group was the proximate cause. *Salt River Valley Water Users' Association v. Cornum*, 49 Ariz. 1, 63 P.2d 639. In that case, the Supreme Court of Arizona very clearly stated the rule with respect to proximate cause, and set aside the verdict of a jury because the Court found, as a matter of law, that there was no causal connection between defendant's negligence and the injury sustained by plaintiff. And, in *Shafer v. Mountain States Tel. & Tel. Co.*, 335 F.2d 932 (9th Cir. 1964), this Court affirmed a judgment of the District Court of Arizona based upon the granting of plaintiff's motion for a directed verdict. This Court decided that, as a matter of law, defendant's violation of a regulation of the Arizona Corporation Commission did not constitute the proximate cause of an injury to plaintiff.

Rather than attempting to explain how DePinto's inattention to the affairs of United, prior to October 1957, may be considered as a proximate cause of the transaction which occurred on October 18 of that year, appellees now adopt the tactic of stating that DePinto, by directing his argument "only to one of the eight acts or claims of negligence and breach of fiduciary duty which were submitted to the jury", has, therefore, conceded that the verdict is supported by evidence with respect to such other alleged claims of negligence. In the face of our argument that the trial Court erred

in admitting evidence of the facts and circumstances unrelated to the transaction of October 18, 1957 (Appellant's Brief, page 27), and our argument that the trial Court erred in charging the jury with respect to alleged acts of negligence having nothing to do with the transaction of October 18, 1957 (Appellant's Brief, page 37), appellees' contention just doesn't make any sense.

In opposition to our argument that the jury was not warranted in finding a causal relationship between the conduct of DePinto prior to October 18, 1957, and the transaction of that date, and our contention that the trial Court erred in admitting evidence of such conduct, appellees say that, under the terms of the pretrial order, the pleadings passed out of the case, and that, therefore, they were entitled to have the jury consider all of the claims (together with evidence in support thereof) included in the pretrial order. They further say that appellant is not now in a position to complain about the matter because appellant did not assign, as error, the entry of the pretrial order by the lower Court. Appellees completely ignore the fact that the trial Court, in effect, modified the pretrial order by specifically excluding, from any further consideration in the case, the "claims" based upon the conduct of DePinto and the other defendants prior to October 18, 1957. At pages 158 and 159 of the Reporter's Transcript, we find:

> "MR. JENCKES: I am not quite sure that I understood; is the $177,000.00 claim in effect being withdrawn? I am not clear about that.
>
> "THE COURT: I am striking it. *I am striking it from further consideration in the presentation of the case at this time.*
>
> "You people yesterday were vigorously, all of you, asserting that that element of the case was not a proper one, and urging me to dismiss it from consideration at this time.
>
> "MR. JENCKES: I am not quarreling with your Honor. I wanted to be clear. *But as I understand, if this matter goes to trial, it would not at any time during the trial be brought up, is that right?*

"THE COURT: That is correct. You and your associates yesterday made the position that somehow you would be prejudiced by reference to this, and I am going to delete that possibility of prejudice by directing now that *no part of the $177,000.00 element of claim shall be referred to in any way or considered or further adjudicated in this proceedings.*" (Emphasis supplied.)

(b) Damages.

Appellees' argument anent the question of damages is, apparently, predicated upon the assumption that the burden was upon DePinto to prove that United was not damaged to the extent of $314,794.19, by the transfer of certain of its assets to American in exchange for American stock. Appellees state: "If he (DePinto) had evidence that the bonds, mortgages and notes were not worth $314,794.19, along with the $166,498.66, in cash, it would have been an easy matter to place such evidence before the jury." (Appellees' Brief, page 49). It is, of course, elementary that the burden was upon appellees to prove the allegations of their complaint, including the amount of damage, if any, suffered by United as a result of the transaction of October 18, 1957. According to the instructions of the trial Court, the jury was required to fix the damages by deducting from the "value of the assets transferred to Kelly", the value of the American stock received by United in exchange. (R.T. 587-588) Appellees argue that the jury had before it evidence from which such determination could be made, because:

> *First*, such assets "were $166,498.66, of cash, $60,668.65, in mortgages, bonds and accrued interest, and $87,626.88, in a promissory note and accrued interest."

So far as is disclosed by the evidence, the mortgages, bonds, and promissory notes could have been completely valueless. The only evidence bearing on the question discloses that the $86,000 note of United Finance Corporation was not an "admitted asset"

and that, as a result thereof, United was already in a deficit condition on October 17, 1957. (R.T. 268, 272)

> "*Second*, since few taxpayers ever pay more federal income tax than is necessary, it is significant that Kelly after consulting with tax counsel filed a federal income tax return reporting $308,000 of the assets * * * as having a fair market value of $308,000."

Kelly did report receiving assets of $308,000, however, he did not purport to say that they had a "fair market value" of $308,000. Needless to say, the manner in which Kelly treated the assets in his income tax return would not be binding on DePinto and could not form the basis of a jury finding as to the value thereof.

> "*Third*, the Insurance Department of Arizona valued them at $308,000 after a three and a half month examination and audit."

The Insurance Department of Arizona did no such thing.

> "*Fourth*, the purchaser American reported its cost at $308,000 on its books and records."

The $308,000 placed on the books of American represented the par value of the 30,800 shares of its stock issued to United in exchange for the assets. The book figure does not purport to represent "fair market value".

> "*Fifth*, DePinto stipulated to the $308,000 in assets in the pretrial order of March 1960, made no reservation therein that such amounts did not represent fair market value, and added therein that, as to him, there were no issues of any material fact."

DePinto did not stipulate that said assets have a "fair market value" of $308,000. The stipulation concerned only the face or nominal value of such assets.

We respectfully submit that there is no testimony whatsoever in the record, either oral or written, having any probative force

as to the "fair market value" of the assets transferred by United to American or as to the "fair Market value" of the 30,800 shares of American stock received by United. On the basis of the record, it was an impossibility for the jury even to make an intelligent guess as to the damage (if any) sustained by United as a result of the transaction of October 18, 1957. Appellees failed completely to carry the burden of proving the amount of damage, if any, sustained by United.

2.

ERRORS IN ADMISSION OF EVIDENCE

(a) Facts and Circumstances Unrelated to Transaction of October 18, 1957.

Appellees contend that DePinto is precluded from claiming error in the admission or rejection of evidence because of DePinto's failure to comply with Rule 18(d) of this Court, reading:

> "When the error alleged is to the admission or rejection of evidence the specification shall quote the grounds urged at the trial for the objection and the full substance of the evidence admitted or rejected, and refer to the page number in the printed or typewritten transcript where the same may be found."

We respectfully submit that we have complied with this Court's rule by setting forth, in Appendix "A" to our Opening Brief, the full substance of the evidence objected to, together with a quotation of the specific objections, and by setting forth, in Appendix "B", the full substance of the rejected evidence and a quotation of the objections interposed thereto. This material was placed in the appendix for the reason that page limitations would not permit its inclusion in the Brief proper.

Much of the evidence to which we objected is set forth by appellees in their Brief at pages 5 to 10, under the heading, "The Facts". Referring to those pages, we ask how did DePinto's association with Life Underwriters, Inc. in 1952 have any relation to

the transaction of October 18, 1957? What significance was the preparation of a prospectus for the sale of United stock which mentioned DePinto as a director of Life Underwriters, Inc.? How could the meeting of March 29, 1955 (when DePinto was not a director of United) have had any remote relationship to the transaction of October 18, 1957? How were directors' meetings of November 15, 1955, June 22, 1956, July 18, 1956 and February 19, 1957, relevant to the transaction of October 18, 1957? How was evidence of such facts relevant or material to any issue in the case in the face of the trial Court's ruling:

> "I will delete that entire element of claim from the balance of the trial. In other words, the defendants will be relieved from having to defend against the claims asserted in the $177,000.00 category. * * * and I am going to delete that possibility of prejudice by directing now that *no part of the $177,000.00 element of claim shall be referred to in any way or considered or further adjudicated in this proceeding.*" (Emphasis supplied.) (R.T. 158-159)

(b) Evidence re Damages.

We believe that our objection, with respect to the report of an examination of the affairs of United made by Guy L. Hammett, an Examiner for the Insurance Department of the State of Arizona, during the year 1958, is fully supported by *Olender v. United States*, 210 F.2d 795 (9th Cir. 1954), cited in our Opening Brief. Contrary to appellees' suggestion, the report is not the sort of document which is admissible under the Federal Business Records Act, 28 U.S.C.A. § 1732. In the case of *LaPorte v. United States*, 300 F.2d 878 (9th Cir. 1962), this Court had this to say about Form 153, prepared by an employee of the Selective Service Board:

> "Mr. Hingston's testimony, plus the whole interrelated content of the Selective Service file, established that Form 153 was completed in the routine day-to-day operations of the Local Board and the Department of Charities. It was precisely the kind of *contemporaneous record of events*, sys-

> tematically prepared by an agency for its own use and relied upon by it in the performance of its functions, which experience has shown to be trustworthy, and which therefore falls within the purpose and scope of the business records exception to the hearsay rule codified in Section 1732." (Emphasis supplied.)

Obviously, the report of Hammett was, in no sense, a "contemporaneous record of events, systematically prepared by an agency for its own use".

Not only was the Kelly income tax return of 1957 pure and unadulterated hearsay, it was irrelevant and immaterial to any issue in the case.

With respect to the testimony of the witness Hammett, it is true that, because of his physical condition, DePinto agreed that appellees could offer his testimony which was adduced at the original trial. DePinto did not agree that such testimony was competent, relevant or material. In large part, Hammett's testimony was pure hearsay.

3.

ERRORS IN REJECTION OF EVIDENCE

Appellees take the anomalous position of arguing that DePinto's conduct from the year 1952 to October 1957, in relation to United and in relation to Life Underwriters, Inc., a stranger to this action, was properly placed before the jury, but that the conduct of the members of the Niesz group, in relation to the transaction of October 18, 1957, was not admissible. The Court will bear in mind that, in the original trial of this action, the defendants were exculpated of charges of fraud in connection with the transaction of October 18, 1957, and that no such charges were made in appellees' amended complaints or in the pretrial order. Under the circumstances, it is obvious that DePinto cannot be held responsible for the acts of the Niesz group, unless the members of that group

acted in a negligent manner. It was impossible for the jury to intelligently appraise the conduct of the Niesz group in the absence of knowledge of their good faith efforts to create a holding company (American), and to acquire Arizona insurance companies in a proper and legal manner. Appellees sprinkle through their Brief the charge that members of the Niesz group were "looters" and had the purpose and design of "looting" United. This is the picture that appellees painted to the jury and DePinto was undoubtedly convicted of guilt by association. Appellees' contention that "the evidence respecting the 'plan' (for securing mortgages) takes on an Alice In Wonderland aura when it is viewed from a distance" becomes pure sophistry when viewed in the light of Gregory's testimony that Mr. Bushnell, the Arizona Director of Insurance, approved the merger which was implemented by exactly the same plan of acquiring mortgages under cerificates of contribution which the Niesz group thought they had arranged. (R.T. 525-537) Gregory's testimony was excluded by the trial Court. (R.T. 537)

4.

ERRORS IN CHARGE TO JURY

Appellees' argument with respect to our assignments of error by the trial Court in instructing the jury indicate that appellees misconceive the thrust of our argument. We start with the proposition that the trial Court erred in submiting any issue of fact to the jury, for the reason that, as a matter of law, the acts or omissions of DePinto were not the proximate cause of any loss or damage to United. We then go to the next step: if this Court should conclude that the trial Court was justified in submitting to the jury the issue of whether or not defendants' participation in the election of the Niesz group to the Board of Directors of United was a proximate cause of loss or damage to United as a result of the transaction of October 18, 1957, the Trial Court,

nevertheless, erred in permitting the jury to find that the alleged negligent conduct of DePinto, unrelated to the transaction of October 18, 1957, was a proximate cause of loss or damage to United. If a complaint clearly charges defendant with three different acts of negligence alleged to have proximately caused an injury, it is elementary that the Court should not submit to the jury the issue of proximate cause with respect to acts of negligence numbers 2 and 3 if, as a matter of law, the Court determines that there is no causal relationship between such acts of negligence and the injury.

In this case, we strenuously and repeatedly objected to evidence of DePinto's conduct, having no causal relationship to the transaction of October 18, 1957, and objected to the Court giving instructions which permitted the jury to find such causal relationship. As the result of the brushing aside of our objections by the trial Court, the jury was led to believe that they were at liberty to find a causal relationship between the transaction of October 18, 1957 and the conduct of DePinto having nothing whatsoever to do with that transaction. In the light of *Butane Corporation v. Kirby,* 66 Ariz. 272, 187 P.2d 325 and *Alires v. Southern Pacific Co.,* 93 Ariz. 97, 378 P.2d 1913, cited in our Opening Brief, the instructions of the trial Court, of which we complain, constitute reversible error.

5.

ERRORS IN FAILING TO CHARGE JURY AS REQUESTED

We can add little to our Opening Brief argument that the trial Court erred in failing to charge the jury as requested by DePinto. It is submitted that, if our view of the evidence in this case, and the law applicable thereto, is correct, then DePinto was entitled to have the Judge instruct the jury as requested.

6.

ERRORS WITH RESPECT TO DELIBERATIONS OF JURY

In response to our argument that the trial Judge erred in answering certain questions presented to him by the jury during their deliberations, appellees say: "Of the several attacks which have been made by appellant DePinto on the integrity and fairness of the visiting district Judge who heard the instant case, none has been more unfair or grossly misleading than the innuendo, implications, inference, and direct statements contained in the argument that the district court prejudiced appellant DePinto by the manner and substance of his answer to a communication from the jury. * * * * these attacks are endemic to appellant DePinto's conduct of his defense here, * * * *" (Appellees' Brief, page 81) We are confident that this Court will not decide this case on the basis of appellees' appraisal of the conduct of DePinto's counsel. We deem it appropriate to reiterate that we have never made an attack upon the integrity of the trial Judge. We do not, however, withdraw from our position that DePinto did not receive a fair trial. We submit that, when the trial Judge advised the jury that "the three items of claimed damage" were the cash, promissory notes, mortgages, bonds and accrued interest, aggregating $314,-794.19, this was an invitation to the jury to bring in a verdict in that exact amount (which the jury did), without giving consideration to the value of such items, and without giving consideration to any reduction in that amount to the extent of the value of the 30,800 shares of American stock received by United in exchange. This was a radical departure from the formal instructions of the Court. (R.T. 588) Irrespective of our failure to make proper objection to the Court's informal instructions to the jury, the instruction adverted to was clearly erroneous and extremely prejudicial to DePinto. Under the circumstances, this Court is entitled to take cognizance thereof. *Michie v. Calhoun,* 85 Ariz. 270, 336 P.2d 370.

7.

JUDGMENT EXCESSIVE

(a) Cancellation of Stock.

Appellees, again, go outside of the record to discuss matters with respect to the DePinto bankruptcy. Even appellees should realize that the judgment entered herein was entered prior to bankruptcy. The facts and circumstances surrounding the bankruptcy are not germane to any issue in this case. The authorities to which we have directed the Court's attention in our Opening Brief disclose (without dissent so far as we can discover) two simple rules of equity and fair play:

> (1) In a stockholders' derivative action against a number of wrongdoers, a wrongdoer will not be entitled to participate in a recovery made on behalf of the corporation against another wrongdoer.
>
> (2) In a stockholders' derivative action, the stockholders who will be benefited by a recovery are not entitled to receive more than that portion of the recovery which the number of shares of stock held by them bears to the total number of shares outstanding.

Appellees do not challenge the fact that the right of American and the Duhames (defendants in this case) to share in any judgment rendered against DePinto, or against any other of the defendants, was foreclosed by their surrender of an aggregate of 42,548 shares of United Stock. Under the circumstances, can it be reasonably argued that DePinto should be required to pay to the holders of the balance of the United stock (certificates of participation under the merger agreement) not only the amount of their damage, but also the amount which American and Duhame were damaged. As a result of the transaction of October 18, 1957, United was alleged to have been damaged $314,794.19. This amounts to $3.15 for each of the 100,000 shares of stock outstanding. If the holders of 50,452 shares of United stock

(certificates of participation) are to share in a judgment against DePinto of $314,794.19, they will, then, receive $5.50 per share of stock. The fact that their recovery will be reduced by appellees' attorneys' fees is immaterial. In no event, would such fees be recoverable. Again, we pose the somewhat naive question, would DePinto still have to pay $314,794.19, to the holder of one share of stock, if all of the other 99,999 shares had been cancelled?

Appellees, again, indulge in their practice of going outside the record when they refer to the fact that: "There are two pending lawsuits in the U. S. District Court for the District of Arizona in which claims are being made against United and Provident by former policy holders of United, and in which Provident has denied it assumed liability of the type asserted therein. *Walker v. Provident Security Life Insurace Co.,* Civ. #4069, and *Mauser v. Provident Security Life Insurance Co.,* Civ. #4070. These claims total $119,099.37 and they cannot be satisfied if sustained from Provident Security Life Insurance Co., even if Provident's disavowal of assumption thereof is rejected. Further, the terms of the merger agreement between United and Provident permit the latter to deduct from the judgment here any proper charges against said recovery." If this Court believes it is proper to follow appellees outside the record, we must then point out that the above-mentioned lawsuits were filed on behalf of the plaintiff's therein by McLane & McLane, attorneys for appellee Doig herein on February 23, 1962. The complaints allege that the plaintiffs purchased single premium annuities from United. The premiums were, in great part, paid by loans against the annuity policies. At the time of the purchase, the plaintiffs and United believed that plaintiffs would be entitled to federal income tax deductions to the extent of the interest paid on the policy loans. At a later date, it was decided by the Tax Court that such interest payments are not deductible. The plaintiffs claim that they are entitled to rescind

their annuity contracts, and recover the cash premiums paid, on the grounds of a mutual mistake of law, or because of misrepresentations of law by United agents. We submit that the actions are frivolous. Counsel for Doig are, of course, in the anomalous position of attempting, in this action, to recover a fund for the benefit of the stockholders of United and, at the same time, prosecute other actions which, if successful, will reduce that fund. The fact remains that there is no suggestion in the record in this case that the proceeds of a judgment herein will be reduced five cents by any claims of third parties.

(b) Credit for Payment by "Joint Tortfeasor".

By his original complaint and amended complaint filed in this action, Gorsuch charged DePinto and Duhame with negligence and breach of their fiduciary duties as directors of United, which allegedly caused damage to United. As alleged joint tortfeasors, DePinto and Duhame were charged with the same acts of negligence. After the first reversal, amended complaints were filed by Doig and Provident wherein DePinto and Duhame were charged with negligence and breach of fiduciary duty with respect to the transaction of October 18, 1957. Appellees do not contend that DePinto and Duhame were not proceeded against herein as joint tortfeasors, or that the claims made against them were not identical. It is not disputed that the Duhame Executors paid $100,000 for a covenant not to sue—a covenant which insulates the Duhame Executors against any and all claims which were, at any time, made herein against Duhame and his Executors (and against DePinto). Under these circumstances, it is the law of the State of Arizona that any judgment rendered herein against DePinto must be reduced by the amount of $100,000.

The rule that a joint tortfeasor is entitled to credit for any sums paid by another joint tortfeasor in consideration of a covenant not to sue is not peculiar to Arizona. In *McNair v. Goodwin,*

136 S.E.2d 218 (N.C. 1964), the Supreme Court of North Carolina stated the rule:

> "But a covenant not to sue does not release and extinguish the cause of action and the cause of action may be maintained against the remaining tort-feasors notwithstanding the covenant. Simpson v. Plyler, supra; Slade v. Sherrod, 175 N.C. 346, 95 S.E. 557. The remaining tort-feasors are entitled, however, to have the amount paid for the covenant credited *on any judgment thereafter obtained against them by the injured party.* Ramsey v. Camp, 254 N.C. 443, 119 S.E.2d 209, 94 A.L.R.2d 348; Holland v. Southern Public Utilities Co., 208 N.C. 289. 180 S.E. 592." (Emphasis supplied.)

See also, *Schumacher v. Rosenthal,* 226 F.2d 946 (7th Cir. 1955) and *Bal Theatre Corp. v. Paramount Film Distributing Corp.,* 206 F.Supp. 708, 714 (U.S.D.C.N.D.Cal. 1962).

Even if the appellees and the Duhame Executors had agreed that the $100,000 payment was not to be credited upon any judgment rendered against DePinto, such agreement would not deprive DePinto of his right to the credit. We quote from *Restatement of the Law, Torts,* Sec. 885, page 463: "Payments made by one of the tortfeasors on account of the tort either before or after judgment diminish the claim of an injured person against all others responsible for the same harm. This is true although it was agreed between payor and the injured person that the payment was to have no effect upon the claims against the other."

(c) Interest.

In response to our claim that the trial Court erred in allowing interest from October 18, 1957, rather than from the date of the judgment, counsel refer to *Zeckendorf v. Steinfeld,* 15 Ariz. 334, 138 P. 1044. That case originated in the territorial days in the District Court of Pima County. The Supreme Court of Arizona affirmed a judgment which included 6% interest on the amounts

recovered, "from the date of the wrongful conversion of such sums by Steinfeld". The *Zeckendorf* case has no application here for it involved a liquidated claim and did not purport to reflect the law of the State of Arizona. The Supreme Court said, in reaching its conclusion: "We think this was 'according to right and justice and the laws of the United States,' and in conformity with the opinion of the Supreme Court (of the United States)." The Arizona case of *Desert Waters, Inc. v. Superior Court,* 91 Ariz. 163, 370 P.2d 652, also relied upon by appellees, has no remote application to the case at Bar. That case involved the condemnation of a water utility by the City of Tucson. A.R.S. Section 12-1123B reads: "If an order is made letting the plaintiff into possession prior to final judgment, the compensation and damages awarded shall draw legal interest from the date of the order."

It will be borne in mind that this action did not present a claim against DePinto for stealing or conversion; and certainly not for the stealing of cash or securities having a fixed value. The trial Court properly instructed the jury that, in arriving at the amount of damages sustained by United, they should determine the value of the assets transferred to American and deduct therefrom the value of the 30,800 shares of American stock received in exchange. (R.T. 588) If the trial Judge had thought that the damages were not unliquidated, then what purpose was served by submitting the issue of damages to the jury.

Appellees argue that this is an equitable action and that, therefore, the matter of determining the date from which interest shall run is within the discretion of the trial Court. We submit that there is no exception to the rule in Arizona that interest on an unliquidated claim (in law or equity) runs from the date of judgment. Furthermore, this Court held, in *DePinto v. Provident Security Life Insurance Co.,* 323 F.2d 826 (9th Cir. 1963), that the claim being asserted on behalf of United is a common law action for negligence—an action at law.

(d) Discharge of Joint Tortfeasors.

Appellees say that the consent judgments which were entered in the amount of $308,000, against James E. Kelly, L. N. Kelly, Nina Dunn and J. L. Jenkins "is just like any other judgment" and did not constitute a release of all claims in excess of that amount which would have the effect of releasing all other joint tortfeasors. Appellees do not challenge the rule that "in an action against joint tortfeasors, judgment cannot be entered against any one defendant for an amount exceeding that entered against a co-defendant." They do not direct the Court's attention to any authorities which derogate from those cited in our Opening Brief.

8.

ERROR IN SEVERING CLAIM

In the original trial of this action, there were 14 defendants. Eight of the other defendants testified at the trial and were subject to *cross-examination* by DePinto. The jury rendered verdicts against Niesz, Sabo, Pegram and Landoe and in favor of DePinto and Duhame. Because all of the parties were before the Court in the initial trial, and because the jury heard their testimony—tested and refined by cross-examination—the jury was able to make an intelligent determination as to the persons who should be held responsible for the transaction of October 18, 1957. In the last trial, the jury, no doubt, felt they had a duty to hold someone responsible for the transaction of October 18, 1957. The only "someone" upon whom they could place responsibility for such transaction was DePinto. Under the circumstances, DePinto had less chance of exculpation at the hands of the jury than the proverbial snowball.

9.

DENIAL OF FAIR TRIAL

In our Opening Brief, we stated: "There are numerous decisions to the effect that an affidavit of bias or prejudice must be

based on something other than rulings against a litigant." Appellees have directed the Court's attention to those decisions. We submit, however, that the authorities cited in our Opening Brief amply support the conclusion that, upon the record in this case, the affidavit was proper, it was timely and invoked the provisions of 28 U.S.C.A. Section 144. Upon the filing of the affidavit, Judge Boldt had no power or authority to proceed further in the action. We, again, quote the language of the Supreme Court (*Re Murchison,* 249 U.S. 133, 99 L.Ed. 942, 75 S.Ct. 623): "A fair trial in a fair tribunal is a basic requirement of due process. Fairness of course requires an absence of actual bias in the trial of cases. But our system of law has always endeavored to prevent even the probability of unfairness".

The judgment of the trial Court must be reversed.

Respectfully submitted,

HERBERT MALLAMO
EVANS, KITCHEL & JENCKES

By JOSEPH S. JENCKES, JR.
Joseph S. Jenckes, Jr.
Attorneys for Appellant, Angus J. DePinto

JONES & BRINIG

By ANTHONY O. JONES
Anthony O. Jones
Attorneys for James P. Donohue, Trustee in Bankruptcy of the Estate of Angus J. DePinto

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

JOSEPH S. JENCKES, JR.
Joseph S. Jenckes, Jr.